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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**

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10 UNITED STATES OF AMERICA,
11 Plaintiff,
12 v.
13 ANTONIO GARCIA-CHAVEZ,
14 Defendant.

Case No. 2:08-cr-00239-LDG (PAL)

ORDER

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17 The defendant, Antonio Garcia-Chavez, moves pursuant to 28 U.S.C. §2255 to
18 vacate, set aside, or correct his sentence (#59). The government opposes the motion
19 (#69). Having read and considered the papers and the record, the Court will deny the
20 motion.

21 Under 28 U.S.C. § 2255, a federal prisoner can move to vacate a sentence on the
22 ground that it “was imposed in violation of the Constitution or laws of the United States.”
23 However, motions under 28 U.S.C. § 2255 “must be based on an independent
24 constitutional violation” and “may not be used as a chance at a second appeal.” *United
25 States v. Berry*, 624 F.3d 1031, 1038 (9th Cir. 2010). Accordingly, claims brought under
26 Section 2255 are procedurally defaulted and barred if the defendant fails to raise them

either at trial or on direct appeal, and fails to show cause and prejudice excusing the default. *United States v. Ratigan*, 351 F.3d 957, 962 (9th Cir. 2003) (*citing Bousley v. United States*, 523 U.S. 614, 622 (1998); *United States v. Skurdal*, 341 F.3d 921, 925 (9th Cir. 2003) (“If a criminal defendant could have raised a claim of error on direct appeal but nonetheless failed to do so, he must demonstrate both cause excusing his procedural default, and actual prejudice resulting from the claim of error.”) (internal citation omitted); *United States v. McMullen*, 98 F.3d 1155, 1157 (9th Cir. 1996) (“Because McMullen failed to raise any objection regarding the type of methamphetamine, either at sentencing or on direct appeal, he is barred from raising this issue in a § 2255 motion.”).

A criminal defendant is entitled to reasonably effective assistance of counsel. *McMann v. Richardson*, 377 U.S. 759, 771, n. 14 (1970). The right to effective assistance of counsel is the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). When a true adversarial criminal trial has been conducted, even if defense counsel has made demonstrable errors, the requirements of the sixth amendment have been met. *United States v. Cronic*, 466 U.S. 648, 656 (1984). Counsel is presumed competent. As such, the burden rests on the defendant to establish a constitutional violation. *Cronic* at 658.

To obtain reversal of a conviction, petitioner must prove (1) that counsel's performance was so deficient that it fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defense to such a degree as to deprive the defendant of a fair trial. *Strickland*, 466 U.S. at 687-88, 692 (1984). To establish deficient performance under *Strickland*, it must be shown “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. *Id.* at 687. Exercising highly deferential judicial scrutiny, *Id.* at 699, this court inquires “whether counsel's assistance was reasonable

1 considering all the circumstances.” *Id.* at 688. “Such assessment must be made ‘from
2 counsel’s perspective at the time,’ so as ‘to eliminate the distorting effects of hindsight.’”
3 *Silva v. Woodford*, 279 F.3d 825, 836 (9th Cir. 2002) (citing *Strickland*, 466 U.S. at 689).
4 Prejudice can be presumed only “where there has been an actual breakdown in the
5 adversarial process at trial.” *Toomey v. Bunnell*, 898 F.2d 741, 744 n. 2 (9th Cir.), cert.
6 denied, 111 S.Ct. 390 (1990); See also *Cronic*, *supra*.

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8 Background

9 The defendant pled guilty to conspiracy to distribute methamphetamine. The plea
10 memorandum recites that the defendant conspired to distribute 2,049 grams of a mixture
11 and substance containing methamphetamine. The plea memorandum, which was not
12 binding on the court, further recited that the parties anticipated that defendant’s total
13 offense level would be 29, and that his advisory guideline range would be 87-107 months.
14 In fact, as reported by Probation, the purity of the methamphetamine was such that 801.6
15 grams of actual methamphetamine were attributable to the defendant as relevant conduct.
16 As a result, the total offense level was 31, with an advisory guideline range advisory of 108-
17 135 months. Nevertheless, Probation recommended a two-level downward departure and
18 a sentence of 87 months. The Court followed Probation’s recommendation, and imposed a
19 sentence of 87 months.

20 Construed liberally, the defendant alleges that, prior to pleading guilty, his lawyer
21 advised him that he would receive a sentence of between 31 - 39 months if he pled guilty.
22 He further suggests that, on the day of sentencing, his lawyer advised him that the
23 minimum sentence the government was offering was 87 months. At some point, the
24 defendant alleges, the lawyer indicated that he would appeal the sentence and that the
25 defendant was eligible for and would receive a five-year reduction in his sentence (for
26 which he would qualify under a new law). The lawyer did not, however, appeal the

1 sentence. As indicated by the defendant, at some points in his relationship with his lawyer,
2 the communication between himself and his lawyer was confusing.

3 The defendant's counsel has submitted an affidavit. In that affidavit, he indicates
4 that defendant retained James L. Buchanan II, APC, to represent him in this matter, and
5 that counsel, James Kelly, was employed by James L. Buchanan II, APC. Kelly
6 acknowledges that he had a communication with Buchanan on about March 10, 2009, in
7 which Buchanan indicated that he had visited with the defendant at the North Las Vegas
8 Detention Center, and that he had given the defendant erroneous advice. Specifically,
9 Buchanan indicated that he had advised the defendant that, if he signed the proposed plea
10 memorandum, he would receive a sentence of about three years. After the visit, Buchanan
11 recognized the error and informed Kelly that the defendant would instead probably have a
12 sentence of about nine years.

13 Two days later, on March 12, 2009, Kelly met with the defendant immediately prior
14 to his plea hearing. Prior to the hearing, Kelly informed the defendant that Buchanan had
15 given him erroneous advice regarding the probable sentence, and that if the defendant
16 signed the proposed plea memorandum, he would probably be sentenced to a term of
17 about nine years. Kelly further informed the defendant that he did not need to plead guilty,
18 and that the hearing could be continued to allow the defendant to discuss the sentence
19 with Buchanan, or to proceed to trial. Kelly had the entire plea memorandum interpreted
20 and read to the defendant. Kelly further emphasized that the minimum sentence that he
21 could receive was five years, and that the advisory guideline range was 108-135 months.
22 Kelly indicates that he answered all of the defendant's questions. The defendant then
23 decided to go forward and sign the plea agreement and enter a plea of guilty.

24 The court then conducted the plea hearing, during which the Court specifically
25 advised the defendant that the minimum sentence was five years, and engaged in a plea
26 colloquy ensuring that the defendant's plea was knowing and voluntary.

1 As noted above, at the sentencing hearing on June 26, 2009, the Court followed the
2 recommendation of Probation, determined that the advisory guideline range was 108-135
3 months, and then departed downward and imposed a sentence of 87 months. Near the
4 conclusion of the sentencing hearing, the defendant indicated that he had been told that he
5 "was going to get a sentence lower by five years, but - because it was my first offense."
6 Upon further questioning by the Court, the defendant stated that he was told by "other
7 attorney" that he "would get five years off because this was my first time." The defendant
8 followed this statement up with the following: "But, in any case, I do not trust them,
9 because they have always lied to me. But – I only trust in God, and if this is what I
10 deserve, as I have said, God and your Honor are the ones that know what I deserve."

11 The Court then discussed the defendant's comments with both the government and
12 trial counsel. The prosecutor suggested that perhaps the defendant was referring to the
13 fact that the government could have indicted the defendant such that he would face a 10-
14 year statutory minimum sentence. The record indicates that, due to the manner in which
15 the government actually indicted the defendant, he faced only a five-year statutory
16 minimum sentence.

17 Defense counsel suggested that the defendant may have been referring to his
18 conversation with Buchanan. Defense counsel acknowledged that Buchanan had given
19 the defendant erroneous advice, but prior to the entry of his plea, defense counsel had
20 informed the defendant that Buchanan's advice was erroneous, that it would be the judge
21 and not the lawyers who decided the sentence, that a sentence of about three years was
22 not possible based on the negotiated plea. Defense counsel further indicated that he had
23 expressly gone through the guideline (108-135 months) and statutory ranges (5 years to 40
24 years) with the defendant. After receiving this advice, the defendant decided that he did
25 not want to go to trial and would take the negotiated deal.

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1 The Court then reviewed the plea memorandum with the defendant, first asking the
2 defendant whether he had read the plea memorandum with a translator when the plea was
3 taken. In his declaration to the Court, defense counsel indicates that the translator had
4 read the entire plea memorandum with the defendant prior to the plea hearing. The Court
5 then specifically noted that the plea memorandum recited that the statutory range for the
6 offense was 5 years to 40 years. The Court further noted that, under the guidelines, the
7 advisory guideline range was 108-135 months, but that probation had recommended a
8 downward departure to 87 months.

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10 Ineffective Assistance of Counsel - Erroneous Advice as to Possible Sentence

11 To the extent that the defendant's present petition alleges that his counsel was
12 ineffective for giving erroneous advice as to the length of his sentence, the argument fails
13 because defense counsel recognized and corrected the error prior to the defendant making
14 a decision whether or not to plead guilty. Defense counsel expressly advised the
15 defendant that the minimum statutory sentence was 5 years, and that the guideline range
16 would probably be in the range of 108 - 135 months. The entire plea memorandum was
17 translated and read to the defendant. The plea memorandum specifically recited that the
18 statutory minimum sentence was 5 years. The plea memorandum also recited that the
19 Total Offense Level would be 31, prior to any reductions or departures. For criminal history
20 category I, the advisory guideline range was 108-135 months. Defense counsel expressly
21 advised the defendant that, under the plea memorandum, the impact of the sentencing
22 guidelines was that the defendant probably faced a sentence of about 108-135 months, but
23 that the Court could impose a sentence within this range, or higher, or lower. As such,
24 prior to the defendant making a decision to plead guilty, defense counsel corrected
25 Buchanan's error, and the defendant's decision did not rest upon that erroneous advice,
26 but was made with knowledge that the defendant would face a sentence much longer than

1 31 or 39 months. Under these circumstances, the defendant did not receive ineffective
2 assistance of counsel, as Buchanan's erroneous advice was corrected so that the
3 defendant's decision whether to plead guilty rested upon the effective assistance of his
4 counsel.

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6 Ineffective Assistance of Counsel - Failure to Appeal

7 The defendant also argues that his counsel represented that he would file an appeal
8 that would result in a five-year reduction of his sentence, but that counsel never filed an
9 appeal. While counsel did not file an appeal, the argument fails for several reasons. First,
10 as indicated above, defense counsel and the court correctly advised that the minimum
11 statutory sentence was five years. Defense counsel demonstrated knowledge, during the
12 sentencing, that the statutory minimum sentence was five years. As such, following the
13 sentencing defense counsel would not have instructed the defendant that an appeal would
14 result in a five-year reduction of sentence, as such a reduction would fall far below the
15 statutory minimum. Second, the defendant waived his right to appeal in his plea
16 agreement. As indicated above, the entire plea memorandum had been translated and
17 read to the defendant prior to his plea hearing. At the plea hearing, the Court expressly
18 questioned the defendant whether his waiver of his right to appeal was freely and
19 voluntarily made, to which the defendant responded in the affirmative. Further, at
20 sentencing, the Court again asked the defendant whether he had freely and voluntarily
21 waived his right to appeal, to which the defendant again responded in the affirmative.

22 Finally, the defendant has not alleged, suggested, or otherwise indicated any
23 arguable issue for appeal. The defendant was notified that the minimum sentence was 5
24 years. The plea memorandum contemplated an offense level of 31. The Court determined
25 that the defendant's offense level was 31, but departed downward two-levels and

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1 sentenced the defendant to 87 months. The defendant has not shown that counsel was
2 ineffective for failing to file an appeal. Accordingly, for good cause shown,

3 THE COURT **ORDERS** that the Defendant's Motion under 28 U.S.C. §2255 to
4 Vacate, Set Aside, or Correct Sentence (#59) is DENIED.

5 THE COURT FURTHER **ORDERS** that Defendant's Motion for Appointment of
6 Counsel (#70) is DENIED.

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8 DATED this 29 day of December, 2011.
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Lloyd D. George
United States District Judge

